

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

KERRY BOULTON,

Plaintiff,

vs.

AMERICAN TRANSFER
SERVICES, INC., a Delaware
corporation; RUBEN SANCHEZ, an
individual; ANA GUERRA DURAN,
an individual; and DOES 1-50,
inclusive

Defendants.

CASE NO. 15cv462-GPC(RBB)

**ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS WITH LEAVE TO
AMEND**

[Dkt. No. 3.]

Before the Court is Defendants' motion to dismiss the complaint for failure to state a claim. (Dkt. No. 3.) Plaintiff filed an opposition on April 24, 2015. (Dkt. No. 6.) Defendants filed a reply on April 30, 2015. (Dkt. No. 7.) Based on the reasoning below, the Court GRANTS Defendants' motion to dismiss with leave to amend.

Background

On March 2, 2015, Plaintiff Kerry Boulton ("Plaintiff") filed a complaint¹

¹In their brief, Defendants raise a previous filed action by Plaintiff in case no. 14cv175-GPC(RBB) where Plaintiff alleges the same fraudulent acts and where Defendants moved to dismiss based on failure to meet the heightened pleading standard under Federal Rule of Civil Procedure 9(b). While Defendants moved to dismiss on the same grounds as this motion, the Court never ruled on the merits of Defendants' motion to dismiss because the Court granted Plaintiff leave to amend. The case was eventually dismissed based on a stipulation by the parties. Therefore, the prior action

1 against Defendants American Transfer Services, Inc. (“ATS”), Ruben Sanchez (“Mr.
2 Sanchez”), and his wife, Ana Guerra De Sanchez (“Mrs. Sanchez”) alleging state law
3 causes of action for fraud, conversion, violation of California Penal Code section 496,
4 and money had and received. (Dkt. No. 1.)

5 Plaintiff is a resident of Melbourne, Australia. (Id. ¶ 2.) According to the
6 complaint, in August 2013, Plaintiff attended a webinar about purchasing tax deeds
7 and/or tax liens on real property situated in the United States. (Id. ¶ 14.) Defendants
8 advertised their services to Plaintiff and “represented that ATS is an exclusive service
9 provider capable of assisting foreign individuals with creating legal business entities
10 for the purpose of investing in real property that is subject to tax liens and/or tax deeds
11 within the United States.” (Id.) Based on their representations, Plaintiff decided to
12 allow Defendants to assist her with prospective investments. (Id.)

13 Around September 2013, Defendants informed Plaintiff that she needed to wire
14 funds to a Bank of America account that was designated solely for incoming wire
15 transfers. (Id. ¶ 15.) Defendants informed Plaintiff that once the funds were received,
16 they would create a separate bank account and transfer the wired monies for the sole
17 benefit of Plaintiff. (Id.) They provided Plaintiff with specific wiring instructions and
18 she complied. (Id. ¶ 16.) Around October 2013, Plaintiff transferred \$1,000 to
19 Defendants and Defendants confirmed receipt of the \$1,000 but failed to create a
20 separate bank account. (Id.) They said they would “be providing a[n] account number
21 and routing number for [Mrs. Boulton] shortly.” (Id.)

22 Around November 2013, Plaintiff discovered real property located in the County
23 of Miami-Dade in Florida that was subject to a tax deed and/or tax lien that she wished
24 to purchase as an investment. (Id. ¶ 17.) She informed Defendants of her intention to
25 purchase the property and they instructed her to wire the necessary funds to ATS. (Id.)
26 She explained that she intended to transfer \$155,000 to ATS for the purpose of
27 purchasing the real property located in Miami-Dade County, Florida and explained that

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has no effect on the instant complaint.

1 \$7,500 was to be deposited with the Miami-Dade County Clerk of Court in order to
 2 allow her to participate in the purchasing of that property. (Id.) Defendants stated they
 3 understood Plaintiff's intentions as well as her specific instructions regarding the
 4 transferring of funds and provided her with wiring instructions to transfer \$155,000 to
 5 ATS. (Id. ¶ 18.) Plaintiff completed the wire transfer around November 18, 2013.
 6 (Id.) She confirmed delivery of the funds with Defendants and provided transfer
 7 instructions for the \$7,500 to be deposited with the Miami-Dade County Clerk of
 8 Court. (Id. ¶ 19.) However, the deposit was never made to the Miami-Dade County
 9 Clerk of Court. (Id. ¶ 20.) Several days after the \$155,000 wire transfer, Defendants
 10 produced a transfer receipt of \$7,500 from ATS to the Miami-Dade County Clerk of
 11 Court. (Id.) She later learned the transfer receipt was forged when she contacted the
 12 Miami-Dade County Clerk of Court and was informed there was no record of any
 13 money received from, or on behalf of, Plaintiff. (Id.)

14 Upon learning this, Plaintiff immediately contacted Defendants and demanded
 15 an explanation. (Id. ¶ 21.) However, Defendants terminated all communications with
 16 Plaintiff by refusing to respond to all attempts of correspondence. (Id.) She repeatedly
 17 demanded the return of her money but Defendants have refused to return the \$156,000
 18 unlawfully obtained by Defendants from Plaintiff. (Id.)

19 Discussion

20 A. Legal Standard as to Federal Rule of Civil Procedure 12(b)(6)

21 Federal Rule of Civil Procedure ("Rule") 12(b)(6) permits dismissal for "failure
 22 to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Dismissal
 23 under Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory
 24 or sufficient facts to support a cognizable legal theory. See Balistreri v. Pacifica Police
 25 Dep't., 901 F.2d 696, 699 (9th Cir. 1990). Under Federal Rule of Civil Procedure
 26 8(a)(2), the plaintiff is required only to set forth a "short and plain statement of the
 27 claim showing that the pleader is entitled to relief," and "give the defendant fair notice
 28 of what the . . . claim is and the grounds upon which it rests." Bell Atlantic Corp. v.

1 Twombly, 550 U.S. 544, 555 (2007).

2 A complaint may survive a motion to dismiss only if, taking all well-pleaded
3 factual allegations as true, it contains enough facts to “state a claim to relief that is
4 plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly,
5 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
6 content that allows the court to draw the reasonable inference that the defendant is
7 liable for the misconduct alleged.” Id. “Threadbare recitals of the elements of a cause
8 of action, supported by mere conclusory statements, do not suffice.” Id. “In sum, for
9 a complaint to survive a motion to dismiss, the non-conclusory factual content, and
10 reasonable inferences from that content, must be plausibly suggestive of a claim
11 entitling the plaintiff to relief.” Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir.
12 2009) (quotations omitted). In reviewing a Rule 12(b)(6) motion, the Court accepts as
13 true all facts alleged in the complaint, and draws all reasonable inferences in favor of
14 the plaintiff. al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009).

15 Where a motion to dismiss is granted, “leave to amend should be granted ‘unless
16 the court determines that the allegation of other facts consistent with the challenged
17 pleading could not possibly cure the deficiency.’” DeSoto v. Yellow Freight Sys., Inc.,
18 957 F.2d 655, 658 (9th Cir. 1992) (quoting Schreiber Distrib. Co. v. Serv-Well
19 Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, where leave to
20 amend would be futile, the Court may deny leave to amend. See DeSoto, 957 F.2d at
21 658; Schreiber, 806 F.2d at 1401.

22 **B. Legal Standard as to Federal Rule of Civil Procedure 9(b)**

23 Where a plaintiff alleges fraud in the complaint, Rule 9(b) requires a plaintiff to
24 “state with particularity the circumstances constituting fraud or mistake. Malice, intent,
25 knowledge, and other conditions of a person’s mind may be alleged generally.” Fed.
26 R. Civ. P. 9(b). A party must set forth “the time, place, and specific content of the false
27 representations as well as the identities of the parties to the misrepresentation.” Odom
28 v. Microsoft Corp., 486 F.3d 541, 553 (9th Cir. 2007) (internal quotation marks

1 omitted). Rule 9(b) also applies to claims that are “grounded in fraud” or “sound in
2 fraud.” Vess v. Ciba-Geigy Corp., U.S.A., 317 F.3d 1097, 1103-04 (9th Cir. 2003).

3 As to multiple fraud defendants, a plaintiff “must provide each and every
4 defendant with enough information to enable them ‘to know what misrepresentations
5 are attributable to them and what fraudulent conduct they are charged with.’” Vegas
6 v. JPMorgan Chase Bank, N.A., 654 F. Supp. 2d 1104, 1115 (E.D. Cal. 2009) (quoting
7 Pegasus Holdings v. Veterinary Centers of America, Inc., 38 F. Supp. 2d 1158, 1163
8 (C.D. Cal. 1998)). A plaintiff cannot lump multiple defendants but must state the
9 allegations as to each defendant separately concerning that defendant’s alleged
10 participation in the fraud. Swartz v. KPMG LLP, 476 F.3d 756, 764-65 (9th Cir. 2007)
11 (quotation omitted). In a fraud action against a corporation, a plaintiff must “allege the
12 names of the persons who made the allegedly fraudulent representations, their authority
13 to speak, to whom they spoke, what they said or wrote, and when it was said or
14 written.” Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal. App. 4th 153, 157 (1991).

15 Defendants argue that the complaint fails to meet the heightened pleading
16 requirements under Rule 9(b) by failing to allege the time, place, and specific content
17 of the false representations, or the identities of the parties that made the alleged
18 representations. They also argue that the complaint fails to set forth an explanation as
19 to why the alleged statement or omissions were false or misleading, or why Defendants
20 knew they were false or misleading at the time they were allegedly made.

21 First of all, state of mind of the defendants do not have to be alleged with
22 specificity. See Fed. R. Civ. P. 9(b). Moreover, the Court concludes that the complaint
23 provides sufficient facts as to the time, place, and specific content of the false
24 representations, but does not identify the acts of each defendant separately. Instead,
25 Plaintiff lumps the defendants together as “Defendants.” Plaintiff does not differentiate
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1 between ATS, Mrs. Sanchez² and Mr. Sanchez. Moreover, as to ATS, Plaintiff has
 2 failed to sufficiently identify the “names of the persons who made the allegedly
 3 fraudulent representations, their authority to speak, to whom they spoke, what they said
 4 or wrote, and when it was said or written.” See Vega, 654 F. Supp. 2d at 1115.

5 Defendants also argue that Rule 9(b) applies to all the causes of action in the
 6 complaint because they are grounded in fraud. The Court agrees. The causes of action
 7 for conversion, California Penal Code section 496, and money had and received are
 8 based on the same course of fraudulent conduct that is alleged in the fraud cause of
 9 action. See e.g. Fields v. Wise Media, LLC, No. C 12-5160 WHA, 2013 WL 3187414,
 10 at *3 (N.D. Cal. June 21, 2013) (conversion claim, and money had and received were
 11 grounded in fraud and must meet Rule 9(b) pleading requirement). Therefore, Plaintiff
 12 must also meet the heightened pleading requirement under Rule 9(b) as to these causes
 13 of action. Since Plaintiff has failed to properly allege specific facts on the fraud cause
 14 of action, the same conclusion applies to the remaining causes of action.

15 Conclusion

16 Based on the above, the Court GRANTS Defendants’ motion to dismiss with
 17 leave to amend. Plaintiff shall file an amended complaint on or before **May 18, 2015.**

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 24 ²In their reply, Defendants argue that the complaint should be dismissed with
 25 prejudice as to Mrs. Sanchez. They contend because Plaintiff dismissed Mrs. Sanchez
 26 from the prior case, 14cv175-GPC(RBB), with ample opportunity to conduct discovery
 27 and the fact that no facts are alleged as to Mrs. Sanchez in the instant complaint, Mrs.
 28 Sanchez should be dismissed with prejudice. Defendants’ argument is without merit.
 First, Defendants provide no legal authority that the Court has discretion to dismiss
 Mrs. Sanchez with prejudice based on their argument. Moreover, it does not appear
 that discovery commenced in the prior case since the Federal Rules state that discovery
 may not commence until the Rule 26(f) conference is held. See Fed. R. Civ. P.
 26(d)(1). In the prior case, the Rule 26(f) conference was to be held on March 4, 2015.
 (Dkt. No. 50.) The case was dismissed prior to that date on February 17, 2015.

1 The hearing set for May 8, 2015 shall be **vacated.**

2 IT IS SO ORDERED.

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4 DATED: May 5, 2015

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6 HON. GONZALO P. CURIEL
7 United States District Judge
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